No. 14,694

IN THE

United States Court of Appeals

For the Ninth Circuit

ELLA E. HARROLD, *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	

OPENING BRIEF FOR PETITIONER.

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Table of Contents

Table of Authorities Cited

Cases

Rules

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1. Statement of the case in compliance with Rule 18(2)(c).

The taxes involved are those of petitioner Mrs. Ella E. Harrold for the years 1946, 1947 and 1948.

The question to be decided is as follows:

A husband paid taxes on his entire income from personal services. Thereafter, in a divorce suit, the Superior Court of California charged such taxes against the community property and the decree distributed the residue between the parties. After the decree of divorce the husband changed his position, filed amended returns reporting only one-half of the income and claimed a refund of taxes. The Commissioner reopened the wife's returns and added to her income one-half of the husband's earnings.

Quaere: Is the proper solution of the problem to direct that the additional tax chargeable against the wife should be set off against the refund which would be payable to the husband as the result of the deduction of half of his reported income from earnings?

What was the consequence of the husband's election to report his earnings and to pay taxes thereon and his procurement of reimbursement by the divorce court. Did such procedure constitute a conclusive determination of the liability for taxes on the income even though a tax savings could have been accomplished if the husband had initially elected to split the income as community property?

The facts were stipulated in the Tax Court. They are as follows:

During the years 1946, 1947 and part of 1948, and many years prior thereto petitioner was married to Ellsworth Harrold. Except for a brief period in 1945 they lived together at Sacramento, California, until March 25, 1948, when they separated. Mrs. Harrold sued for divorce in the California Superior Court.

During the years in question they filed separate returns. In his returns Mr. Harrold reported his personal earnings in their entirety. He also reported income from separate assets. On the aggregate amount of this income Harrold computed his taxes and made payment accordingly.

During these same years, the petitioner, Mrs. Harrold, filed returns showing income from her separate assets and paid taxes thereon. She did not include any of her

husband's earnings in her return. The amount paid by her was as follows:

1946	$1,567.24
1947	428.39
1948	676.75

In 1948 the divorce action came on for trial. The Superior Court determined the amount of income attributable to Harrold's personal services during said years and held that this was community property. The court then proceeded to take into consideration the living expenses of the parties during those years and deducted them from the community income. The balance was $62,898.34. Of this balance the court allotted to Harrold $61,164.10 on account of income taxes which he had paid during said years for the account of community. The result was that the community property determined as of the date of the trial was virtually exhausted. All that remained was $1,734.24 and of this Mrs. Harrold was awarded one-half, or $867.12.

The interlocutory decree of divorce embodying this award was entered in the State Superior Court on February 15, 1949.

Subsequent to the entry of the decree, Harrold filed with the Bureau of Internal Revenue amended income tax returns for said years. Therein he reported only one-half of the income attributable to his personal services.

He also filed claims for refund based on the theory that he had overstated his income by including in his original returns Mrs. Harrold's one-half community interest therein.

As the result of Harrold's claims for refund, the Commissioner reopened Mrs. Harrold's tax returns and determined that one-half of Harrold's income should be added to the income reported by Mrs. Harrold for the years 1946, 1947 and 1948. The Commissioner levied deficiencies against her accordingly in the aggregate amount of $24,272.33, which bore interest of almost $10,000 more, making a total obligation of $34,000.

The refunds claimed by Harrold on the basis of his amended returns exceed the amount of the deficiencies and interest assessed against Mrs. Harrold for the period involved.

While the matter was pending in the Bureau of Internal Revenue, Mrs. Harrold commenced an action in the Sacramento Superior Court for relief against the consequences of Harrold's change of position.

The complaint was dismissed by the Superior Court.

Mrs. Harrold appealed to the District Court of Appeal of California. While the appeal was under submission the decision of the Tax Court in this case was announced. The deficiencies were affirmed.

Thereafter the District Court of Appeal filed its judgment affirming the dismissal in the Superior Court. The basis of the decision was that Mrs. Harrold's action was barred by the principle of *res judicata.* (*Harrold v. Harrold,* 127 Cal. App. 2d 582.) A petition for hearing by the Supreme Court of California was denied.

Mrs. Harrold brought to the attention of the Tax Court the decision of the appellate court of California. She requested the Tax Court to permit her to file the state

court's opinion as evidence in the tax case. The offer was rejected by the Tax Court.

If Mrs. Harrold is barred from relief in the state courts, she must pay, for a second time, taxes on the community income, which taxes were refunded to her husband when the state divorce court appropriated her share of such community income for that purpose. If Harrold should receive from the Treasury Department another refund of income taxes which he paid as manager of the community and for its account, the result will be a miscarriage of justice almost without precedent.

The Tax Court was not oblivious of the injustice of the situation. In its opinion the Tax Court said:

> We recognize that there is a strong, equitable consideration here in petitioner's favor. In arriving at a division of community property, the Superior Court of California charged petitioner's share with the Federal income taxes previously paid by her former husband. But although he may now recover a refund of an amount previously credited to him in the divorce settlement, we cannot presume to adjust possible inequities therein. (T. p. 45.)

2. Statement of petitioner's contentions and specification of errors.

The contentions of Mrs. Harrold on this appeal are the following:

1. The taxes assessable to Mrs. Harrold should be set off against the refunds claimed by her husband.

The Tax Court is not impotent to prevent the perpetration by Harrold of this fraud against the petitioner. The Federal courts are not obliged to cooperate with Harrold

so as to enable him to achieve the objective of his shrewd maneuver.

2. When Harrold elected to pay the taxes on his earnings and thereafter such earnings were diminished and virtually exhausted by the divorce court in making an accounting, the tax on the entire income was paid and satisfied out of the proper source by the party responsible for its payment.

3. When the tax was paid, Mrs. Harrold's obligations were satisfied so that the Commissioner is barred from levying a tax against her on the same income; by the same reasoning, it would be incumbent on the Commissioner to reject Harrold's claim for refunds.

4. The Tax Court should have received in evidence the decision of the California District Court of Appeal in Harrold v. Harrold.

On the basis of the foregoing contentions, the petitioner specifies the following errors on the part of the Tax Court:

(1) Assuming that petitioner's husband can be deemed to have made an overpayment of taxes, the Tax Court erred in holding that such overpayment cannot be applied as a setoff against the alleged deficiencies against petitioner.

(2) The Tax Court erred in holding that petitioner is chargeable with one-half of the income attributed to Ellsworth Harrold's services for the years 1946, 1947 and 1948.

(3) The Tax Court erred in holding that the taxes on said income had not already been paid and satisfied

by petitioner's husband who, as the manager of the community, was personally liable for the taxes on petitioner's share of the community income as well as the taxes on his own share thereof.

(4) The Tax Court erred in holding that petitioner's husband had not made a conclusive election when he paid the taxes on her share of the community income, using for that purpose the community property which was responsible for the payment of both petitioner's and his own taxes on the community income.

(5) The Tax Court erred in denying the motion of petitioner to put in evidence the decision of the California District Court of Appeal in Harrold v. Harrold which was announced subsequent to the filing of the opinion of the Tax Court.

The opinion of the District Court of Appeal is made a part of the Transcript of Record by reference to volume 127 of the Advance California Appellate Reports, pages 725-728, thereafter published in permanent form at 127 Cal. App. (2d) 582 (T. p. 50). The refusal of the Tax Court to receive in evidence the decision of the District Court of Appeal is assigned as error (par. (g) T. p. 57). Therefore, the decision of the California appellate court is before the Court of Appeals for such consideration as it merits in the determination of this proceeding.

3. The case at bar does not involve an effort on the part of the petitioner to prevent the Government from collecting taxes to which it is entitled.

Mrs. Harrold is not seeking to frustrate the collection of taxes. On the contrary, the Government has

received its taxes and Mrs. Harrold has been charged with and has satisfied the obligation as the result of the exhaustion for that purpose of the very income which is the subject of the taxes.

If the situation were permitted to remain in status quo, the Government would suffer no loss.

In prior cases in which the principle of division of community income has been involved, the Government was endeavoring to secure payment of the full amount of taxes.

For example, where the wife has a large separate income, and the husband's income consists only of personal earnings, it would be to the disadvantage of the Government to permit the husband to include all of the earnings in his return. The reason is that the wife's income is in higher brackets.

Another example is where the husband has reported the entire community income but as the result of his bankruptcy the Government has been unable to collect. In that case the Government's obvious recourse is to add one-half of the income to the wife's return and—if she is solvent—to collect from her.

In the case at bar the situation is just the reverse. Here the course which the Commissioner has pursued will—if permitted to proceed to consummation—result in diminishing the aggregate amount of taxes payable on Harrold's earnings. This is so because if the deficiencies against Mrs. Harrold are upheld, her former husband will collect as refunds from the Government substantially more than the amount for which Mrs. Harrold is liable.

Hence, the only person who stands to profit is Harrold and the question to be determined is whether the administrative and judicial arms of the Federal Government are compelled to co-operate with Harrold in his strategy and provide him with the means of perpetrating this obvious injustice.

It is the contention of the petitioner that the Federal courts are not impotent in the matter and that they are not without the power and means of preventing the taxing agency from being used by Harrold as his helpless accomplice.

4. A conclusive method of determining the proper course for the Commissioner to pursue is to assume that Mrs. Harrold is financially irresponsible.

The law and its administration must be the same regardless of Mrs. Harrold's solvency. Hence, in order to test the propriety of the program adopted by the Commissioner we should consider the position on the hypothesis that Mrs. Harrold is unable to pay the deficiencies assessed against her.

So the pertinent question arises: Would the Government be obliged to make the refunds to Harrold and thereby be deprived of its taxes on one-half of the community income?

The Tax Court has ruled that the Commissioner has no alternative—that neither the husband nor the community property is responsible for the taxes which would be assessable against the wife as the result of a split of the community earnings; and that the Commissioner has no power to make an offset.

This ruling, we respectfully submit, is based on a misinterpretation of the authorities.

5. **In California the husband is the sole manager of the community property, and he—as well as the community property itself—is liable for the taxes assessable on the basis of split returns against both husband and wife.**

The proposition stated in the above title has been twice decided in the Federal Court of California.

In the Matter of *Richard F. Ryan, d/b/a Ryan Furniture Co., Bankrupt,* a case decided in the United States District Court for the Southern District of California, Central Division, on December 13, 1949, and reported in the 1951 CCH Standard Federal Tax Reporter at paragraph 9493, the Government made a claim against Ryan's estate in bankruptcy for the amount of income taxes payable by Ryan's wife.

Each of the spouses had filed separate returns. The community income was split equally in the returns. It had been derived partly from the husband's services and partly from other assets directly traceable to his services.

The Trustee in Bankruptcy opposed the claim, contending that Ryan's bankrupt estate was not liable for the tax on Mrs. Ryan's share of the community income.

The Referee sustained the Trustee's objection.

The District Court reversed, holding as follows:

> *Conclusions*
>
> (a) That 100% of the community property is liable for the taxes upon said half of the 1945 income reported in Mrs. Ryan's return and assessed in her name;

(b) That Mr. Ryan, as sole manager of the community enterprise, is personally liable for the payment of said tax so reported and so assessed; and

(c) That the Referee's order should be reversed and the Trustee's objections to the Government's claim should be denied. (1951 CCH Standard Federal Tax Reporter, par. 9493, p. 17274.)

To the same effect is *Matter of George J. Rogers, d/b/a Coast Door & Sash Co.*, decided by the Referee in Bankruptcy in the United States District Court for the Southern District of California, Central Division, October 18, 1951, and reported in the 1951 CCH Standard Federal Tax Reporter at paragraph 9495.

In the *Rogers* case the Trustee in Bankruptcy was resisting a claim against the bankrupt's estate made by the Government for income taxes payable by the bankrupt's wife. Both husband and wife filed separate returns for the year 1947. All income reported was community property, derived partially from the husband's services and in part from the assets of the community.

The Referee held:

Conclusions of Law

I. That all of the community property of the spouses is liable for the taxes reported by (the wife) in her separate return for the year 1947 and assessed in her name.

II. That (the husband), as sole manager of the community enterprise, is personally liable for the payment of the tax so reported and assessed.

In an effort to avoid the effect of the foregoing decisions, the Tax Court describes them as "dictum" (T. p. 42). We respectfully submit that the Tax Court is mistaken. In both cases the points are squarely decided and are entitled "Conclusions of Law".

The Tax Court also refers to the fact that both of the bankrupt estates were "composed entirely of community property" (T. p. 42). But the Tax Court does not indicate whether this should be regarded as a ground of distinction. If such is the implication, it would not be sound. In the case at bar Harrold was awarded the bulk of the community income because of the fact that he had paid taxes on such income. Consequently, community property is the subject matter involved here, just as it was in the two bankruptcy cases.

Therefore, we respectfully submit that the learned Tax Court fell into error in stating: "This contention (that the husband is liable) is not supported by any citations of authority either in the cases or by petitioner" (T. p. 42).

Then, with respect to petitioner's contention, the Tax Court says:

> It is contrary to a line of cases in which we, and other courts, have held that the powers of management conferred upon the husband by community property laws do not render him personally liable for taxes on his wife's share of the community income. (T. p. 42.)

In support of this statement the Tax Court cites *Poe v. Seaborn,* 282 U. S. 101, 75, L. Ed. 239, *Cavanagh*

v. C. I. R., 42 B. T. A. 1037, and *Marshall v. C. I. R.,* 41 B. T. A. 1064. With all deference we respectfully submit that the Tax Court has erroneously stated the ruling in these cases. None of them involved the right of the Government to collect from the husband the tax on the share of the community income returnable by the wife—nor the right of the Government to retain tax payments made by the husband on account of the community income and to charge against such payments the amount assessable against the wife.

On the contrary, in *Poe v. Seaborn,* 282 U. S. 101, 75 L. Ed. 239, the sole question was whether the husband and wife, residing in Washington, had the right to report one-half of the community income in their separate returns. The court sustained this right on the ground that "the wife has, in Washington, a vested property right in the community property, equal with that of her husband; and in the income of the community, including salaries or wages of either husband or wife, or both" (282 U. S. 111; 75 L. Ed. 243). Accordingly, the court rejected the Commissioner's contention that the husband was obligated to report the entire community income and pay taxes thereon.

The difference between *Poe v. Seaborn* and the case at bar is that Seaborn had never reported the income as his own; he had never voluntarily paid taxes thereon; his wife reported one-half of the income in her return and presumably paid taxes thereon. The spouses had complied with the requirements of the law. That was the situation when the Commissioner stepped in and sought to upset it. Obviously, he could not prevail.

The Supreme Court recognized that the husband is the manager of the community property and quoted language to that effect from an earlier opinion in *Warburton v. White,* 176 U. S. 484, page 494; 44 L. Ed. 555, page 559. There the court also declared that the right of management was "vested in him (the husband), not because he was the exclusive owner, but because by law he was created the agent of the community" (282 U. S. p. 112; 75 L. Ed. p. 244).

Cavanagh v. C. I. R., 42 B. T. A. 1037 and *Marshall v. C. I. R.,* 41 B. T. A. 1064, go no further than *Poe v. Seaborn,* except that they deal with wives who were residing outside of the State of California where the husband's services were performed and the income received. The husband was entitled to report one-half of such income because it was community income, notwithstanding the absence of the wife.

Hence, the sole question in *Cavanagh* and *Marshall* was —as in *Poe v. Seaborn*—whether the husband could be taxed in higher brackets by compelling him to return the entire community income. The Board held that because of the rule that the wife's domicile follows the husband's, the absence of the wife did not justify a departure from the principle that the community income may be divided.

The *Cavanagh* and *Marshall* cases did not involve the remedy available to the Government to collect taxes on the entire income.

There is nothing in those cases to the effect that if Cavanagh's wife failed to pay taxes on her share of

the income, the Government would be helpless and unable to proceed against Cavanagh, who had actually received all of the community earnings. As a matter of principle and common sense it must be clear that the Government could compel Cavanagh to pay the tax of both himself and his wife levied against them on account of income which was received in its entirety by Cavanagh and no part of which was received—except in a theoretical sense—by his wife.

The Tax Court quotes (T. pp. 42-43) from the Cavanagh opinion to the effect that the husband's control does not make him the owner of the community property and income, and that the wife is taxable on one-half of such income. As we have seen, that decision does not reach the point involved in the case at bar. The Tax Court says (T. p. 42) that the *Cavanagh* case "adequately answers petitioner's contention". Obviously, it does not.

The same comment is applicable to the citation by the Tax Court of *Marjorie Hunt v. C. I. R.*, 22 T. C. 228, where it was held that the wife must return one-half of the income and that she is liable for the tax thereon. But the *Hunt* case did *not* decide that a husband who received and retains the community income is *not* liable for the tax on the share of both of the spouses.

Also pertinent to this discussion is the Tax Court's description of petitioner's contention. According to the Tax Court, the petitioner "argues that . . . no part of such (community) income is now taxable to her" (T. p. 41). This is not a correct statement of petitioner's contention. What she does contend is that under the circum-

stances of this case the Commissioner should not enforce the liability against her but should do so out of the taxes which have already been paid by Harrold.

On the basis of the foregoing discussion, we conclude that the husband is liable for the tax on the entire community income even though it is reported in equal shares in the separate returns of the spouses.

From this premise it may readily be demonstrated that the proper and equitable course is to apply the tax assessable to Mrs. Harrold against the refunds claimed by Harrold.

The Tax Court says this may not be done. The answer is that there is no such inhibition either by statute or on principle. And even the prior decisions of the Tax Court which are cited in the opinion are not determinative of the question. These propositions we will now demonstrate.

6. Fundamental principles of logic and justice demand that the taxes assessable to Mrs. Harrold should be set off against the refunds claimed by Harrold.

As we have seen, the appellate court of California has professed its inability to frustrate Harrold's plan. The reason given is that the rule of res judicata bars Mrs. Harrold from relief.

But the Federal courts are not impeded by any such principle. They have control of the assessment of taxes as well as the refund thereof.

We have shown that the Commissioner has the right to collect from Harrold the taxes assessable against the

entire community income notwithstanding that it is divisible between the Harrolds for purposes of the return.

The Government has received from Harrold as taxes more than the amount which would be assessable against both of them on the basis of separate returns.

As a matter of logic and principle it follows that the Commissioner has the right to use the funds on hand for the purpose of satisfying the assessment which would otherwise be levied against Mrs. Harrold. The excess can be refunded to Harrold pursuant to his claims.

Neither the Supreme Court nor any Court of Appeals has considered the precise question involved in the case at bar. Hence, this Honorable Court has an open field.

Is there any legal obstacle to this program?

Cases have arisen in the Court of Claims which provide ample precedent in support of Mrs. Harrold's contention.

For example, in *Clayton v. U. S.,* 44 Fed. (2d) 427, the question involved Clayton's claim to recover interest on an overpayment of taxes resulting from a joint return reporting community income instead of dividing the income between Clayton and his wife.

The issue was similar to that at bar. The Government opposed the allowance of interest, contending that the overpayment made by Clayton should be set off against Mrs. Clayton's liability. Thus, the Government took the same position as that of Mrs. Harrold in the case at bar. The Government prevailed.

On the basis of the original joint return Clayton had paid more taxes than were due. Thereafter the error was corrected by the filing of separate returns by Clay-

ton and his wife. The Commissioner's action is stated in the opinion by the Court of Claims as follows:

> The Commissioner allowed no interest upon the portions of the overassessments on the joint returns for 1918 and 1919 which were allocated and applied in satisfaction of the tax finally determined by him to be due separately by plaintiff and his wife, Julia S. Clayton, on the community property basis. (p. 431.)

Clayton's contention is stated in the opinion as follows:

> . . . that, when the tax of plaintiff and his wife was computed separately on the community property basis, the overassessments of the tax as shown assessed and paid on the original joint returns of plaintiff and his wife for 1918 and 1919 were overpayments by the plaintiff, and, when a portion of such tax was allocated in satisfaction of the tax due by Mrs. Clayton on the community property basis, interest was payable on such amounts to plaintiff as provided by section 1116 of the 1926 act as in the case of other credits. (p. 432.)

The Commissioner's contention is stated in the opinion as follows:

> . . . that no interest was payable upon that portion of the tax paid upon the original joint returns which was allocated to the tax due by Mrs. Clayton on a separate community property basis, because the payment of that amount on the original joint return was merely a payment by her in respect of her tax. (p. 432.)

The Court of Claims held that Clayton was not entitled to interest on that portion of the overassessment against

him which was subsequently allocated to the tax payable by Mrs. Clayton based on the split of community income. The reason for this decision was that when Clayton paid taxes on the entire community income, so much of the amount paid which should have been paid by Mrs. Clayton was her tax paid out of community funds. The opinion of the Court of Claims is so pertinent that it justifies extended quotation, viz.:

> On the third issue, we are of opinion that the Commissioner of Internal Revenue correctly refused to allow and pay interest upon that portion of the overassessment on the original joint returns subsequently allocated to the tax determined to be due by Mrs. Clayton, computed on the community property basis. The correctness of the determination of the income and the tax due by plaintiff and his wife on the community property basis and their right to report their income on the community property basis is not in question. When the original joint returns of plaintiff and his wife were made and the tax shown thereon was paid, a part of the tax was paid on the community income belonging to the wife and out of community funds belonging to her. To the extent, therefore, of the payment of the original tax on the entire income shown on these returns which should have been paid by the wife, it was her tax paid out of community funds. When the Commissioner of Internal Revenue, upon the claim of plaintiff and his wife, determined and computed the income and the tax separately on the community property basis and allocated a portion of the tax returned and paid upon the joint returns to the tax due by the wife upon that portion of the community income allocated to her, he was in contemplation of law using her money

> which had been paid on the joint return out of undivided community funds in respect of the tax for which she would have been liable had separate returns been filed in the first instance. To the extent, therefore, of the tax liability of the husband and the wife when the income shown on the joint returns was divided between them, there was, in reality, no overpayment. But, for administrative purposes, the Commissioner correctly treated the excess of the tax shown and assessed on the joint return over that due by the plaintiff on a separate basis as an overassessment, since he signed the return, and his name only appeared on the assessment list. The community fund is an undivided fund in which the husband and the wife each have a one-half interest. (p. 432.)

Thus, the principle for which Mrs. Harrold contends was applied for the purpose of protecting the Government against the payment of excessive interest. The Government should not be permitted to blow hot and cold. If the Commissioner was right in the *Clayton* case, he is wrong in the case at bar.

The *Clayton* case was approved and followed by the Court of Claims in *Lattimore v. U. S.,* 12 Fed. Supp. 895, where it was held:

> The next question relates to the individual case of the plaintiff, O. S. Lattimore (No. J-592). The facts have been most minutely set out in the special findings of fact, and we feel it is unnecessary and burdensome to this opinion to again state them.
>
> Lattimore for the year 1918 filed a joint tentative original amended income tax return for himself and his wife, and the tax shown on this return was paid.

> Later he filed a separate individual return showing a much smaller tax due, and subsequently he filed a claim for refund. The main contention made in this case is that the Commissioner applied a part of the amount paid by Lattimore in the joint return to the individual tax of the wife after the husband and wife had made separate returns, and Lattimore contends that the overpayment due to him, as found by the Commissioner, could not and should not be applied to the liability of his wife. We can find no merit in this contention. The overpayment arose due to the fact that there had been a joint return made and the tax liability of both husband and wife was reported and paid, but the assessment was made in the name of the husband and thereafter separate rereturns were filed and the liabilities of the two parties were shown separately. This, of course, gave an overpayment in favor of the husband, in whose name the assessment on the joint return had been made. The Commissioner, after several audits and after taking into consideration the claims of the husband, arrived at the conclusion that the payment made by the husband on the joint return was made from community funds, and that therefore, when the joint return was split up into two separate individual returns, a part of the payment made by the husband belonged to the wife, and he applied a part of the tax paid by the husband to the payment of the tax found to be due against the wife on her individual return. The husband recognized that the wife was entitled to a part of the amount paid when he filed a claim for refund and credit, and in fact made such allocation to his wife. (pp. 910-911.)

The foregoing cases demonstrate that the Commissioner has the power to set off the husband's overpayment

against the wife's tax liability. If the Commissioner can do so, the Tax Court has the same authority. But—the Tax Court says—"we cannot direct what is to be done with his (Harrold's) refund" (T. p. 45). At that point the Tax Court's opinion refers to the *Clayton* and *Lattimore* cases and seeks to distinguish them on the ground that "in each of these cases, the overpayment resulted from a joint return of both spouses, thus clearly indicating that the amount originally paid with the joint return was meant to apply to the tax liabilities of each" (T. p. 46).

There is no basis for the attempted distinction. In the first place, the initial filing of a joint return does not provide any implication as to what may be in the mind of the husband with respect to the consequences of a different allocation of income in the future.

Assuming—as the Tax Court asserts—that any such inference should be drawn from the fact that the Claytons initially filed a joint return, there is just as much reason for drawing the same inference from the course initially pursued by Harrold. When he elected to tax himself on the basis of his entire earnings, he clearly indicated that no tax should be levied against his wife on account of such earnings. That indication is just as effective as the one which the Tax Court seeks to use in an effort to distinguish the *Clayton* and *Lattimore* cases.

Second, there is nothing in the *Clayton* or *Lattimore* opinions indicating that the Court of Claims attached any significance to joint returns as evidence of the taxpayer's intent.

Third, the question is one of the power of the Commissioner to make the offset and of the courts which review his action to direct him to do so. That power does not depend on the will of any taxpayer. The power cannot be conferred on the Commissioner by the form of the original return. Nor can he be deprived of the power because a different form is used.

Finally, the concept advanced by the Tax Court that in the case at bar the Commissioner's power to make a setoff can be derived from the consent of the taxpayer is in conflict with rulings by the Board of Tax Appeals in cases on which the Tax Court relies in support of its decision here. The Board refused to require the Commissioner to make a setoff even though the taxpayer involved was willing and urged such adjustment. The citations from the Board of Tax Appeals appear at page 44 of the transcript. These cases will be analyzed later.

The subject of offset arose in the Court of Claims for a third time in *Marshall v. United States,* 26 F. Supp. 474. There the plaintiff, Mrs. Marshall, was formerly married to Morosco. They agreed that their respective earnings would be separate property. Each of them reported income accordingly. Mrs. Morosco's income was much larger than her husband's and likewise her tax.

The Commissioner audited the Moroscos' books and determined that they must each return one-half of the aggregate income, resulting in a substantial overassessment for the wife and a deficiency against the husband.

Under California law the wife's earnings were always community property. At the time the Moroscos' case

arose the law had been changed so as to confer on the wife a vested interest in the community property. This, of course, was applicable to community income. Consequently, if there had been no agreement between the Moroscos as to ownership of their earnings, each would have been obliged to report one-half of the aggregate income.

There was a serious question whether the California law as to community earnings could be annulled by contract. The point had arisen in the case of another taxpayer. For this reason the Commissioner decided to defer action as to Mrs. Morosco's overassessment and notified her to that effect. But about a year later the Commissioner informed Mrs. Morosco that the certificate of overassessment would be withheld until Morosco paid his deficiency. Eventually, the Commissioner announced that the overassessment would not be refunded.

Mrs. Morosco sued (under her new name after a divorce from Morosco) contending (1) that an account had been stated, and (2) that the community property law of California was paramount and could not be annulled by contract. The majority of the court rejected both contentions and sustained the action of the Commissioner.

But one member of the court—Judge Littleton—disagreed as to the second point. He decided that the agreement of the Moroscos as to earnings was ineffectual to avoid the consequences of the 1927 change of the California community property law. But he concurred in the result, basing his opinion on a different ground, viz.: that Mrs. Morosco's overassessment and Morosco's de-

ficiency must be set off against each other. Citing the *Clayton* and *Lattimore* cases, Judge Littleton said:

> However, since plaintiff returned income which under the community interest was taxable to her husband and in the absence of facts to the contrary, it must be assumed that the tax of $23,275.58 here involved was likewise paid out of the community income erroneously reported by plaintiff. The Commissioner, therefore, acted correctly when he refused to make a refund to plaintiff. Compare Benjamin Clayton v. United States, 44 F. 2d 427, 70 Ct. Cl. 740; Lattimore et al. v. United States, 12 F. Supp. 895, 82 Ct. Cl. 97, 130, 131. The refund provision should have a practical application. In a case such as this we cannot assume that the tax applicable to the community income taxable to the husband, which plaintiff remitted, belonged to plaintiff any more than did the income erroneously reported by her. Therefore, a tax paid by either husband or wife out of community property follows the community income for tax purposes. The facts and circumstances involved in this case distinguish it from Krug v. United States, 18 F. Supp. 242, 84 Ct. Cl. 502. I therefore concur in the decision dismissing the petition. (p. 480.)

Of course, Judge Littleton's views do not necessarily express the opinion of the majority of the court. But they are entirely consistent with its prior decisions and it is only reasonable to assume that if the other members of the court had found it necessary to determine the point, they would have agreed with Judge Littleton's view.

It is of particular interest that Judge Littleton did not deem it necessary to mention either the fact that the original returns were separate, rather than joint; or the

fact that Mrs. Morosco did not consent to the offset; or that Morosco was not a party to the action. Hence, it is reasonable to conclude that in Judge Littleton's opinion these circumstances did not affect the application of the principle of offset.

It is worthy of note that at the time of the Marshall decision (1939) Judge Littleton was no novice in the field of taxation. He had been a member of the Board of Tax Appeals from 1924 to 1929, occupying the position of Chairman during the last three years. Then he was promoted to the Court of Claims and ever since has been a member of that court.

Confronted with Judge Littleton's concurring opinion and realizing that it disposes of all of its efforts to distinguish the *Clayton* and *Lattimore* cases, the learned Tax Court states:

> We do not consider ourselves bound by any language to the contrary as expressed by a concurring opinion in Corrine Griffith Marshall v. U. S. 88 Ct. Cl. 393, 26 F. Supp. 474 (1939). (T. p. 45.)

That is undoubtedly true. A concurring opinion is not controlling. But its reasoning in the added light of the prior decisions of the Court of Claims should provide persuasive grounds for a determination in the case at bar for which the Tax Court recognizes "that there is a strong equitable consideration" (T. p. 45).

In an earlier section (sec. 4) we suggested the hypothesis that Mrs. Harrold is financially irresponsible and pointed out that in that case the Government would not confess itself helpless to collect the full amount of

taxes to which it is entitled. The same consideration would apply if the statute of limitations barred an assessment against Mrs. Harrold. In that case the Government would find a means of preventing Harrold from recovering a refund.

Such a situation confronted the United States Supreme Court. The parties involved were the trustees and the beneficiary under a trust. In *Stone v. White,* 301 U.S. 532, 81 L. Ed. 1265, the issue was:

> . . . Whether the petitioners, testamentary trustees, who have paid a tax on the income of the trust estate, which should have been paid by the beneficiary, are entitled to recover the tax, although the government's claim against the beneficiary has been barred by the statute of limitations. (301 U.S. 533, 81 L. Ed. p. 1268.)

The facts in the *Stone* case were as follows: Galen L. Stone's will left property in trust. It provided that the net income therefrom be paid his wife as sole beneficiary at such times and in such amounts as she should deem best during her natural life. She elected to take the bequest under the will in lieu of her dower or statutory interest. At that time the various Circuit Courts of Appeals had decided that in these circumstances the income payments to the widow were annuities purchased by surrender of the dower interest and not taxable as income to her until they equalled the value of the dower interest. In conformity to the ruling of these decisions, Mrs. Stone did not include in her return any portion of the income received by her from the trust. The Commissioner assessed a deficiency against the trustees which they paid under protest. In the meantime, the statute of limitations had run against the right of the Government

to collect from the widow as beneficiary of the trust. Then the Supreme Court overruled the decisions of the Courts of Appeals, holding that the income was taxable to the beneficiary and not to the trustees. (*Helvering v. Butterworth,* 290 U. S. 365; 78 L. Ed. 365).

The trustees sued for recovery of the taxes which had been erroneously collected from them. Consequently, the Government was in a dilemma. Its right to pursue the beneficiary was barred. If it was compelled to make a refund to the trustees, no tax would be collected on account of the income.

In the District Court the trustee prevailed. The court held that the "trust, for income tax purposes, is an entity separate and distinct from the beneficiary of the trust" (*Stone v. White,* 8 Fed. Supp. 354, 355). The Circuit Court of Appeals reversed, and its judgment was affirmed by the Supreme Court, which answered the reasoning of the District Court as follows:

> It is said that as the revenue laws treat the trustee and the beneficiary as distinct tax-paying entities, a court of equity must shut its eyes to the fact that in the realm of reality it was the beneficiary's money which paid the tax and it is her money which the petitioners ask the government to return. Formerly, trustee and cestui que trust were likewise distinct in the eyes of the law, as they are today for many purposes. But whenever the trustee brings suit in a court which is free to consider equitable rights and duties, his right to maintain the suit may be enlarged or diminished by reference to the fact that the suit, though maintained in the name of the trustee alone, is for the benefit and in the equitable interest of the cestui. (301 U. S. pp. 535-536; 81 L. Ed. p. 1270.)

The Supreme Court attached particular significance to the equitable aspect of the problem—a factor which the Tax Court noted in the case at bar—but to which the Tax Court was unwilling to give effect.

The same reasoning which was adopted to protect the Government against loss of taxes in *Stone v. White* should be equally available to Mrs. Harrold to protect her from being the victim of a monumental swindle on the part of her former husband. It should make no difference whose ox is being gored.

The Supreme Court readily surmounted the proposition as to the separate identity of two taxpayers. The same result can be and should be accomplished in the case at bar. It is this proposition upon which the Tax Court has placed particular emphasis. In its opinion the court says:

> We have repeatedly held that each spouse is a separate and distinct taxpayer, and that we cannot require the Commissioner to credit one with a refund due the other. (T. p. 44.)

The foregoing statement is based on cases decided by the Board of Tax Appeals. Of course, in the case at bar this Court is not obliged to follow the Board of Tax Appeals, particularly in view of the contrary decisions of the Court of Claims.

However, an examination of the cited decisions of the Board of Tax Appeals will disclose that even the Board has not been consistent in their treatment of cases involving husband and wife and community income.

In *Preston v. C. I. R.*, 21 B. T. A. 840, the facts were as follows:

Preston and his wife, residents of California, filed separate returns, each reporting one-half of the husband's earnings, and paid taxes thereon. At that time the wife's interest in community property was merely an expectancy. Consequently, the Prestons were not entitled to split the income. Accordingly, the Commissioner ruled that the entire income was taxable to Preston and a deficiency was assessed against him. The Commissioner did not credit the amount of the additional tax found to be due from Preston with the amount of the tax previously paid by his wife (p. 840).

The Board upheld the Commissioner in his determination that the entire income was taxable to Preston but they reversed the Commissioner's refusal to make the offset. The Board decided that because the case involved community income, all of it was taxable against the manager of the community and the proper course was to adjust between the spouses the total amount paid as taxes on such community income.

The Board said:

> Petitioner also asserts that in computing the amount of the deficiency due from him on the community income, credit should have been allowed for the amount of tax already paid upon the wife's return. Ordinarily the proper method of treating such a situation would be to refund the overpaid tax to the wife, who made her return as a taxpayer. In this case, however, it appears that all income returned by the wife was community income. The wife had no separate income and the tax paid on the wife's return was paid on the community income. The Commissioner is now asserting that all such income is

> taxable to the husband, the manager of the community. It would therefore seem proper that the husband should be allowed credit for the total amount of tax paid on the community income return by both spouses, to the extent that such payment has not been refunded or otherwise credited. (p. 849.)

There is no basis for distinguishing the *Preston* case from that at bar insofar as the application to community income is concerned. The only difference is one without a distinction. The Prestons split the community income at a time when, under the law of California, they were not entitled to do so. Here Harrold reported the entire community income at a time when, under the law of California, it was proper to divide it in half. If—as the *Preston* case decides—the Commissioner had the power to, and it was proper for him to, set off the amount erroneously paid by Mrs. Preston against the amount which Preston owed because he had underpaid his tax, it was likewise proper for the Commissioner to take similar action with respect to the additional tax against Mrs. Harrold and the overpayment which had been made by her husband. Furthermore, in view of the fact that the Board of Tax Appeals reversed the Commissioner and that its opinion constituted a direction that he make the offset, it is equally clear that the Tax Court should have pursued the same course in the case at bar.

With respect to the *Preston* case, the Tax Court says:

> Petitioner cites John W. Preston, 21 B. T. A. 840 (1930), wherein we might appear to have made an exception to that rule. However, in that case, the two spouses were still married and living together. (T. p. 44.)

The answer is that—as we shall hereafter show—the *Preston* case does not represent an exception to any rule and, as the extract above quoted from the opinion of the Board discloses, the decision was not based on the continuance of the Preston marriage. On the contrary, the subject was not even mentioned and for all that appears in the opinion the marriage may have terminated.

Furthermore, as a matter of principle, the propriety of an offset results from the nature of the earnings as community property when received and does not depend on whether the spouses remain married to each other.

There is another answer to the effort of the Tax Court to distinguish the *Preston* case from that at bar.

The earliest case in the Board of Tax Appeals in which the issue of setoff arose is *Vayssie v. C. I. R.*, 8 B. T. A. 587, decided in 1927. This is cited by the Tax Court in support of its decision at bar (T. p. 44). The ruling in the *Vayssie* case cannot be reconciled with that in *Preston v. C. I. R.* which was decided three years later.

Vayssie and his wife, residents of California, filed separate returns, splitting the community income, and paid taxes accordingly. This was prior to the 1927 amendment of the California law which conferred on the wife a vested interest in community property. Hence, the entire income was taxable to Vayssie and a deficiency was assessed against him. The Commissioner gave notice that Mrs. Vayssie's payment would be refunded to her.

Vayssie asked that the two items be set off against each other. The Commissioner refused. The Board made summary disposition of the case, viz.:

> In our opinion, the Board has no authority to require the Commissioner to credit the petitioner's account with a refund due to the petitioner's wife. The Board can not require the Commissioner to credit one taxpayer's account with a refund due another taxpayer. (p. 589.)

Thus, there is a clear conflict between Preston's case and that of Vayssie. But *Preston v. C. I. R.* is subsequent in time and it provides a convincing reason why, in dealing with community income, a husband and wife should not be regarded as separate taxpayers—a subject which is not even mentioned in the *Vayssie* case.

Furthermore, the *Vayssie* case provides the answer to the effort of the Tax Court in the case at bar to distinguish *Preston v. C. I. R.* on the ground (T. p. 44) that the Prestons were married and living together. There was just as much basis for concluding that the marriage of the Vayssies was still in effect when the Commissioner refused to make the setoff.

The *Vayssie* case was not mentioned in the opinion in the *Preston* case. Hence, there is no means of ascertaining whether it was inadvertently overlooked; or on the other hand, the Board intended to overrule it. Let it suffice to point out that the *Preston* case is in complete accord with the decisions of the Court of Claims—cited above—which settle the point that with respect to the return of and taxation on community income a husband and wife are not to be regarded as separate taxpayers. The logic of this proposition is beyond question—as we shall now demonstrate.

7. **With respect to community income the spouses do not occupy the status of separate taxpayers.**

There is no need to analyze the history of the concept of community property and the manner in which it became engrafted upon the jurisprudence of Texas, Louisiana and some of the western states.

Although the wife has a vested interest in community property, she cannot exercise any control over it except to require restitution of property transferred by the husband without her consent (*Britton v. Hammell,* 4 Cal. (2d) 690).

The community income goes into the pocket of the husband. It is subject to his control. The dollars which he receives are not divided; the wife has no means of requiring that they be divided. It is only theoretically that the wife receives half of the income so as to require her to report it for tax purposes. As the court held in *Clayton v. U. S.,* 44 F. 2d 427 (supra):

> The community fund is an undivided fund in which the husband and the wife each have a one-half interest. (p. 432.)

Husband and wife may be deemed separate taxpayers with respect to their separate incomes, separately reported. But this theory breaks down when we seek to apply it to the concept of community income which is an anomaly in the law.

Clayton challenged the power of the Commissioner to credit his overpayment against his wife's liability. Clayton contended that an adjustment could only be made with respect to the liability of a particular taxpayer. The court rejected this contention, holding:

> The contention of plaintiff that the provisions of section 284 (a) of the Revenue Act of 1926 (26 USCA sec. 1065(a), with reference to the crediting of an overpayment on a return against any tax "then due by the taxpayer" must be literally construed; that the authority of the Commissioner is thus expressly limited to crediting overpayments to the tax due from the particular taxpayer; that the Commissioner has no legal authority in the case of a division of community income on a joint return equally between the husband and wife to credit one taxpayer's account with an overpayment by another taxpayer—argues against the claim that he and his wife had a right under the statute to make separate community property returns. (p. 432.)

The opinion of the learned Tax Court in the case at bar cites other decisions of the Board of Tax Appeals as examples of the ruling that husband and wife are separate taxpayers and that their taxes are not subject to setoff.

One of the cited cases—*Roebling v. C. I. R.,* 28 B. T. A. 644—can readily be eliminated. That did not involve community income; it did not involve husband and wife. The parties were trustee and beneficiary. The Board held that income was taxable to the beneficiary and not to the trust which had reported the income and paid taxes on it. The decision was that "the trust and the beneficiary are, for income tax purposes, entirely different entities" (p. 656). Consequently, the Board held that it could not require the Commissioner to credit the beneficiary's account with a refund due to the trust.

Another case cited in the opinion at bar is *Hunt v. C. I. R.,* 47 B. T. A. 829. There the parties involved were husband and wife. But the subject of taxation was not community income. The wife had sold her separate real property and had claimed various deductions, one of which was the commission which she paid to the real estate broker. A dispute arose with the Commissioner as to whether the wife could take the deductions or, on the other hand, they should be divided equally between the husband and the wife. The Commissioner ruled that they should all be so divided. The Board reversed the action of the Commissioner as to all of the items except the broker's commission. The consequence was that there was a deficiency against the wife and a credit in favor of the husband. An effort to obtain a setoff was rejected on the ground that the spouses were two different taxpayers.

It is at once apparent that the matter of setoff did not involve community income. Consequently, the case is not in point.

This leaves one other citation—*Perine v. C. I. R.,* 22 B. T. A. 201—which was decided by the Board one year after the *Preston* case. An analysis of the facts fails to disclose how community income could possibly be involved in the effort to procure a setoff. The parties were S. W. Fuertel and wife, residents of the State of Washington. The Board's opinion states:

> The husband and wife filed separate returns in which each returned one-half of the community income and their tax liability was determined by the respondent on that basis. This method of reporting

the income and computing the tax thereon was proper. (p. 204.)

It necessarily follows that any deficiency against the wife and overassessment with respect to the husband could not possibly involve community income. That income had been properly reported and properly taxed. Consequently, the decision of the Board that the spouses were separate and distinct taxpayers and that therefore no offset could be required could not have related to community income.

There is no doubt that the language of the Board's opinion—quoted by the Tax Court in the case at bar (T. pp. 44-45)—is broad enough to cover community income. But the Fuertel controversy did not involve community income and therefore, the point cannot be deemed to have been decided.

Furthermore, the Board's opinion proceeds to cite "*Alexander Vayssie,* 8 B. T. A. 587. Cf. *John W. Preston,* 21 B. T. A. 840". In thus citing two inconsistent decisions the Board added to the confusion.

Hence, it is surprising that the Tax Court has found in the Board's record a rule of decision worthy of being regarded as authority in the case at bar.

Certainly, there is no reason why the Court of Appeals should pursue the same course. On the contrary, there is every good reason why the Court of Appeals should prefer the reasoning of the Court of Claims as to the propriety of a setoff where community income of husband and wife is the subject of taxation.

8. The taxes received by the Government from Harrold were derived from community property.

The learned Tax Court says that "there is no evidence that the overpayment by her former husband was made out of community property" (T. p. 43). We submit that such a conclusion is compelled by the stipulated facts.

It is not necessary to show that Harrold's earnings were earmarked and that the precise dollars used by him to pay taxes were those which he received for his personal services.

The identity of the source as community property is established as a matter of legal concept. In *Clayton v. U. S.,* 44 F. 2d 427 (supra) the Court of Claims reached this conclusion without any direct evidence on the subject. There was no testimony or other proof as to the particular dollars which had been used for payment of the tax. The mere fact that the community income was reported and the tax paid thereon was sufficient to demonstrate that the payment was made out of community funds. On this subject the Court of Claims said:

> When the original joint returns of plaintiff and his wife were made and the tax shown thereon was paid, a part of the tax was paid on the community income belonging to the wife and out of community funds belonging to her. To the extent, therefore, of the payment of the original tax on the entire income shown on these returns which should have been paid by the wife, it was her tax paid out of community funds. (p. 432.)

The conclusion of the Court of Claims as to the community source of the tax payment was not, and could

not, have been based on the fact that the Claytons filed a joint return. The significant fact was that community income was reported. In this respect the form of the return was immaterial.

In *Marshall v. U. S.*, 26 F. Supp. 474 (supra) Mr. and Mrs. Morosco each filed separate returns. Nevertheless Judge Littleton in his concurring opinion pointed out that it was a necessary assumption that the tax was paid out of community income. He said:

> However, since plaintiff returned income which under the community interest, was taxable to her husband and in the absence of facts to the contrary, it must be assumed that the tax of $23,275.58 here involved was likewise paid out of the community income erroneously reported by plaintiff. (p. 480.)

Judge Littleton then explained that under the controlling law of California Mrs. Morosco's earnings did not belong to her; likewise, the tax on her earnings which she remitted to the Collector did not belong to her. On those grounds he concluded:

> Therefore, a tax paid by either husband or wife out of community property follows the community income for tax purposes. (p. 480.)

In the case at bar we have additional affirmative evidence which points inescapably to the conclusion that Harrold's tax payments were made out of community property. The fact is stipulated that reimbursement to Harrold on account of taxes paid by him was made from community assets (Par. 9, T. p. 35). Consequently, regardless of what particular dollars Harrold used to

pay the tax, the reimbursement out of community property provides a complete demonstration that the community property was charged with the tax money now in the hands of the Government. Therefore, in contemplation of law the payments came out of community funds.

9. The fact that Harrold is not a party to this proceeding presents no obstacle to the setoff.

In view of the fact that the subject of controversy is the tax payable to the Government, it is not necessary that Mr. Harrold be a party to this case.

The Government has adequate protection against any loss of taxes. The Treasury Department is in possession of the taxes paid by Harrold. There is no possible risk. The Government cannot be compelled to make a refund to Harrold unless and until he commences suit and procures a judgment. Such an action must be commenced in the Federal court. The decision in Harrold's suit must necessarily be consistent with that in the case at bar. If the Court of Appeals decides here that the setoff should be made, the Commissioner will be bound to reject Harrold's claim—except as to the excess. Confronted with the decision in this case, Harrold would realize the futility of further contest. If despite this court's ruling, Harrold should prosecute, an adverse outcome would be a foregone conclusion.

In this situation it is not necessary that this court's decision operate as res judicata against Harrold. The determination of the issue of law would suffice.

10. Harrold's election to report his earnings as his separate income was conclusive.

The law of California as to the community character of personal service income of the husband was settled more than twenty-five years ago. Hence, Harrold cannot profess ignorance when he filed his return for the year 1946. Thus, the situation is readily distinguishable from *Van Antwerp v. United States,* 92 F. 2d 871, and Harrold is conclusively bound by his return.

In *United States v. Pettigrew,* 81 F. 2d 666, Pettigrew filed a joint return for the tax year 1928 which he signed for himself and his wife. The return reported all of the community income. Pettigrew paid the tax. Subsequently he filed for a refund on the basis that he was taxable on only half of the community income. The District Court held that he was entitled to a refund. The Government appealed. The judgment was reversed by the Circuit Court on the ground that Pettigrew was bound by his election in reporting all of the community income in a joint return. The Court held:

> Taxpayer here had from July 29, 1927, until March 15, 1929, to advise himself of the condition of the law of his domicile. If he had any doubt in his own mind he should have resolved it in favor of a return containing his half of the community earnings.
>
> . . . .
>
> The cases cited by taxpayer, in which, under exceptional circumstances, amended returns have been allowed, have no application. Here the taxpayer had abundant time to inform himself as to the community property law, failed to do so, and chose to file a joint return.

> The Commissioner's contention that having, in the circumstances of this case, exercised his option to file a joint instead of a separate return, he cannot claim a refund on the basis of a separate return calculation dividing the earnings of the community, must be sustained. (81 F. 2d 667.)

Pettigrew's election was evidenced by a joint return. Harrold's election was evidenced by a return in which he reported his earnings as his own. There is no logical distinction between the two. Harrold's election was just as conclusive as Pettigrew's.

It makes no difference what Harrold's motive was in reporting the earnings as separate income. It may be that he was planning to lay a foundation for claiming the earnings as his separate property in the event of litigation with his wife. However that may be, Harrold is bound by his election. The tax is irretrievably paid and there is no basis upon which the Commissioner can assess a tax on the identical income to Mrs. Harrold.

We cannot predict, of course, what action Harrold will take in order to secure a refund following the decision in this case. If this Court shall annul the assessment against Mrs. Harrold on the ground that the tax on the income has been paid and is not refundable, the decision will provide a precedent that will suffice to dispose of Harrold's claims, assuming that Harrold should prosecute them further.

On the other hand, if the Court shall be of the opinion that out of an abundance of caution the assessment against Mrs. Harrold should be held in abeyance until Harrold's claims have been rejected by the courts, then appropriate instructions can be given to the Commissioner and thereby

complete protection can be provided for the Government so that under no circumstances can it be deprived of taxes justly due.

The contention of petitioner presented in this section is, of course, aside from and independent of that previously advanced relative to setoff of the refund against the deficiency. Should this Court decide that such a setoff is proper under the circumstances of this case, a complete and satisfactory solution to the problem would be provided. Needless to say, such a decision is the one which should be preferred.

Dated, San Francisco, California,
December 19, 1955.

Respectfully submitted,
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